

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

HENRY GLEEN,

Defendant-Appellee.

UNPUBLISHED
February 11, 2000

No. 220333
Oakland Circuit Court
LC No. 99-164979-FC

Before: O’Connell, P.J., and Meter and T. G. Hicks*, JJ.

PER CURIAM.

This case is before us on remand from our Supreme Court for consideration as on leave granted. We had previously denied the prosecutor’s application for leave to appeal. The prosecutor appeals from the trial court’s order denying its motion to admit other-acts evidence under MRE 404(b). We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant is charged with one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a) (victim under thirteen years of age). The victim is defendant’s step-granddaughter, who was 12 years old at the time of the assault. At the preliminary examination, the victim testified that defendant asked her to go with him to the Mill Dam in Pontiac. She refused at first because she was frightened, but eventually she went with defendant. Defendant drove the victim to Mill Dam, parked under a tree, and turned off the lights. He asked her to remove her pants. She refused, and he then forcibly removed her pants, pushed her legs apart, and vaginally penetrated her with his penis. The victim testified that the reason she was frightened and reluctant to accompany defendant was that, on another occasion, he had driven her to the same location and sexually assaulted her in the same manner.

The prosecutor sought to have evidence of a prior sexual assault allegedly involving the victim and defendant approximately two weeks before, at the same location as the instant charged assault, admitted at trial under MRE 404(b), arguing that the evidence demonstrated a common scheme or plan. The trial court denied the motion, holding that “defendant’s plan or system of raping the complainant is not relevant to any element of the crime charged. The

* Circuit judge, sitting on the Court of Appeals by assignment.

complainant's age, sexual penetration and the defendant's identity are the only elements of this offense." The trial court did not hold that the evidence failed to demonstrate a common scheme or plan in doing an act; rather, the court held that evidence of that common scheme or plan was not relevant. The court also held that, even if the evidence were probative to an element of the offense, the probative value would be substantially outweighed by the danger of unfair prejudice.

Our Supreme Court has directed us to consider whether the trial court's construction of MRE 404(b) was erroneous in light of *People v Starr*, 457 Mich 490; 577 NW2d 673 (1998), *People v DerMartex*, 390 Mich 410; 213 NW2d 97 (1973), and *People v Miller (On Remand)*, 186 Mich App 660; 465 NW2d 47 (1991). We are also directed to consider whether the trial court's ruling regarding the danger of unfair prejudice was erroneous, given that the standard is whether the evidence is *unfairly* prejudicial. Although our review of a trial court's decision whether to admit other-acts evidence under MRE 404(b) is typically reviewed for an abuse of discretion, *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998), our directions on remand from the Supreme Court require us to consider whether the trial court misunderstood the legal principles underlying MRE 404(b). This involves questions of law, and we review questions of law de novo. *People v Connor*, 209 Mich App 419, 423; 531 NW2d 734 (1995).

MRE 404(b)(1) governs the admission of other-acts evidence, and provides as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

In order for other-acts evidence to be admissible, it must be offered for a proper purpose under MRE 404(b), it must be relevant under MRE 402, and its probative value must not be substantially outweighed by the danger of unfair prejudice under MRE 403. *Crawford, supra* at 385; *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). If the evidence is admitted, the court may, upon request, instruct the jury not to consider the evidence for any purposes beyond those for which it was offered. *VanderVliet, supra* at 55.

The thrust of MRE 404(b) is that the prosecutor may not introduce evidence of other acts to demonstrate a propensity to commit the charged offense. *Starr, supra* at 496-497. In this case, the trial court concluded that the prosecutor's stated purpose for introducing the evidence—common scheme or plan—was not relevant to any element of the charged offense. However, proof of a common scheme or plan in doing an act is material to the determination whether a defendant committed the act. *Miller, supra* at 664, quoting *People v Engelman*, 434 Mich 204, 222; 453 NW2d 656 (1990). Therefore, evidence of the other-acts evidence in this case is relevant to proving that defendant committed the charged offense. For evidence to be relevant under MRE 402, it must have some tendency to make an alleged fact more probable. The requisite probative value is minimal—any tendency to prove the alleged fact is sufficient. *Crawford, supra* at 389-390. Here, that requisite probative value was present.

Additionally, the evidence of similar sexual assaults is relevant to rebutting a claim that the victim's testimony is fabricated. *Starr, supra* at 502. Here, the victim's testimony about the previous sexual assault explains why she was apprehensive about accompanying defendant. In *DerMartzex*, the Supreme Court held that evidence of other sexual acts between a defendant and his victim may be admissible if the defendant and victim live in the same household and if, without such evidence, the victim's testimony would seem incredible. *DerMartzex, supra* at 415. Limiting the victim's testimony in this case and not allowing her to testify about the previous assault could seriously undermine her credibility. *Id.* The evidence of the prior assault in this case is probative of the victim's credibility, as well as of defendant's scheme or plan in molesting his step-granddaughter. *DerMartzex, supra; Miller, supra.* Therefore, the trial court incorrectly concluded that this evidence of common scheme or plan was not relevant.

We also conclude that the trial court erred in holding that any probative value of the evidence was substantially outweighed by the danger of unfair prejudice. The crucial inquiry is not whether the evidence is more prejudicial than probative, but whether the probative value of the evidence is *substantially* outweighed by the danger of unfair prejudice. *Starr, supra* at 499. Moreover, "[t]he danger the rule seeks to avoid is that of unfair prejudice, not prejudice that stems only from the abhorrent nature of the crime itself." *Id.* at 500. Here, the evidence consists of the victim's testimony that the same sexual assault happened twice. This evidence does not risk any impermissible inference of propensity. *Id.* at 496. The prosecutor is not arguing that defendant committed bad acts in the past and therefore must be guilty of the charged offense because his character leads him to criminal conduct. Rather, the prosecutor is seeking to introduce evidence that defendant employed a common scheme or plan in sexually assaulting his step-granddaughter. This evidence is material to the question whether defendant committed the charged offense, and any danger of prejudice results only from the abhorrent nature of the act itself. *Id.* at 500. Moreover, the trial court may grant a limiting instruction to ensure that the jury will not consider the evidence for any improper purpose. *VanderVliet, supra* at 55. Therefore, the trial court erred in holding that the danger of unfair prejudice substantially outweighed the probative value of the evidence.

Because the trial court incorrectly applied the legal standards of MRE 404(b), it was an abuse of discretion to deny the prosecutor's motion to admit the evidence at trial.

Reversed.

/s/ Peter D. O'Connell
/s/ Patrick M. Meter
/s/ Timothy G. Hicks